

89-1198-

No. —————

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID VINCENT STEELE,
Petitioner,
v.

STATE OF MINNESOTA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
MINNESOTA COURT OF APPEALS**

ROBERT ARTHUR BRUNIG *
HOPE S. FOSTER
COREY J. AYLING
O'CONNOR & HANNAN
3800 IDS Center
80 South Eighth St.
Minneapolis, MN 55402
(612) 341-3800

* Counsel of Record

Counsel for Petitioner



QUESTIONS PRESENTED

1. Whether the State may consistent with due process and equal protection rescind a criminal defendant's release pending appeal solely because one of the issues he raises in his notice of appeal is ineffective assistance of counsel?
2. Whether the State may consistent with due process and equal protection withdraw all rights to a direct appeal of a criminal conviction whenever a defendant raises as one issue ineffective assistance of counsel?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner David Vincent Steele ("Steele") and the Respondent State of Minnesota (the "State").

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OPINION BELOW

The opinion below consists of an unpublished, three-sentence order *sua sponte* dismissing Steele's appeal of a criminal conviction to the Minnesota Court of Appeals. It is reprinted in the Appendix hereto ("App."), page 1a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). On August 25, 1989, the Minnesota Court of Appeals *sua sponte* dismissed the criminal appeal of Steele, who had been released on appeal bond. Such dismissal violated the due process and equal protection guarantees of the fourteenth amendment. The Minnesota Supreme Court denied Steele's petition for review on October 19, 1989 and Steele's petition for rehearing on November 17, 1989. Steele filed this petition on January

16, 1990—within 60 days after denial of the rehearing pursuant to Supreme Court Rules 20.1, 20.04 in effect in November, 1989 and within 90 days after denial of the rehearing pursuant to Supreme Court Rules 13.1, 13.4 that became effective January 1, 1990. In addition, the Minnesota Supreme Court, by modifying its judgment in an order dated December 20, 1989 denying stay of entry of judgment, App. 6a-7a, extended the time for filing this petition still further. *Burlington-Northern, Inc. v. United States*, 459 U.S. 131, 138 n.5 (1983) (time to petition for certiorari begins anew when decision modified by court below); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973); *Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV.

STATEMENT OF THE CASE

On March 29, 1989, a jury impaneled by Minnesota's Blue Earth County District Court (the "District Court") returned a verdict of guilty against Steele on a charge of criminal sexual conduct in the fourth degree, contrary to Minn. Stat. § 609.35 Subd. (d). Specifically, it was charged, and the jury apparently found, that Steele, for the purpose of satisfying his sexual or aggressive impulses, touched the clothing covering the immediate area of the genitals of EJJ, a fourteen-year-old male more than 48 months younger than Steele.

The trial pitted the credibility of EJJ against that of Steele, who testified in his own behalf. In addition, Steele presented the testimony of Lon Elsass, his business partner. Elsass testified that he was present throughout Steele's interview of EJJ in Steele's office, where the contact allegedly occurred. Elsass observed no sexual contact.

The District Court entered a judgment of conviction on May 12, 1989 and sentenced Steele to 41 months imprisonment, without possibility of parole. Steele immediately filed a notice of appeal. The District Court granted his motion for release pending appeal.

As noted in Steele's statement of the case filed with his notice of appeal, the thrust of Steele's appeal was the ineffective assistance of Steele's appointed trial counsel. The ineffective assistance included the failure of trial counsel—against his own better judgment as expressed in memoranda to his client—to introduce into evidence facts that were available tending to establish EJJ's motive to fabricate. In addition, trial counsel failed to educate and advise his client so as to allow Steele to make an informed decision on the State's pretrial plea offer that would have put a 90-day cap on jail time.

In addition to the ineffective assistance claim, Steele appealed the following errors:

- (1) The District Court's refusal to allow Steele to impeach the alleged victim with his juvenile record;
- (2) The District Court's denial of Steel's motion *in limine* to exclude evidence of homosexuality;
- (3) The evidence was insufficient to convict;
- (4) Discovery of new evidence; and
- (5) The 41-month sentence was improper.

On August 18, 1989, having received and reviewed a copy of the transcript, but not yet having briefed the case, Steele moved the Minnesota Court of Appeals to stay the appeal and for leave to file postconviction proceedings in District Court. The basis for the motion was that Steele had raised a substantial question as to the effective assistance of counsel. Steele pointed out that it was the announced practice of the Court of Appeals to stay consideration of the entire appeal until such time

as the Defendant made a record of his ineffective assistance claim at a postconviction hearing before the District Court.

On August 25, 1989, the Minnesota Court of Appeals *sua sponte* dismissed Steele's appeal. In its three-sentence order, the court reasoned that "it appears appeal should more properly be taken from an order deciding the post-conviction petition." App. 1a. The Court of Appeals then denied Steele's motion for clarification, which stressed that Steele had moved for a *stay* not a *dismissal* of his appeal. App. 2a. The court noted that Steele was free to litigate any issues of the postconviction hearing. App. 3a.

The Minnesota Supreme Court denied Steele's timely petition for discretionary review as well as his petition for rehearing. App. 4a, 5a. As a result of these proceedings in the Minnesota Supreme Court, no final judgment was entered in the Minnesota appellate courts until November 17, 1989, the date of denial of rehearing. In the interim, Steele remained released on appeal bond.

Once final judgment was entered, Steele moved for a stay of entry of judgment pending proceedings to the United States Supreme Court. In the interim—and to the present day—Steele remained released awaiting notice from the District Court as to when and where to report for execution of sentence. On December 20, 1989, the Minnesota Supreme Court denied Steele's motion for stay of judgment, but noted in an attached memorandum: "It may be that if the district court was willing to let movant remain free pending a direct appeal, it will allow him to remain free pending the outcome of the post-conviction proceeding and the subsequent appeal, if any, unless it is clear that the filing of the post-conviction petition was purely for the purpose of delay or unless there are other changed circumstances." App. 7a.

Steele responded to this suggestion by moving the District Court for release pending postconviction proceedings. The prosecuting attorney has informed counsel that he

opposes the motion and will bring a countermotion for immediate execution of sentence. In the event the District Court grants Steele's motion for continued release, such release would substantially moot Steele's petition to this Court. Steele therefore suggests that the United States Supreme Court defer consideration of this petition until such time as the District Court decides whether to execute sentence.

REASONS FOR GRANTING THE WRIT

I. THE ORDER BELOW THAT A CRIMINAL DEFENDANT HAS NO LIBERTY INTEREST IN HIS PERSONAL FREEDOM ON APPEAL CONFLICTS WITH DECISIONS OF THIS COURT.

In barring direct appeals that raise as one issue ineffective assistance of counsel, the Minnesota Court of Appeals necessarily assumed that Steele had no protected liberty interest in his personal freedom pending appeal. Yet this Court has held that a person convicted of a crime may nevertheless enjoy a protected liberty interest in personal freedom by virtue of any limits placed on official discretion by State regulations. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

Minn. R. Crim. P. 28.02 Subd. 7 granted Steele the right to remain released pending review of his conviction, provided he could convince the District Court that, among other things, his appeal was not frivolous and he presented no danger to the community. Steele made that showing and was free on bond when the Minnesota Court of Appeals—without notice or hearing—in effect required his immediate incarceration by dismissing his appeal. Steele's interest in continued release and Minnesota's rules governing appeal bond created a cognizable liberty interest within the meaning of *Kentucky Department of Corrections v. Thompson*, 490 U.S. —, 104 L.Ed.2d 506, 515 (1989), and *Olim*, 461 U.S. at 249.

There are few more profound deprivations of liberty than imprisonment. Yet the Court of Appeals would incarcerate Steele without so much as notice and a hearing to consider mitigating circumstances. Instead, the Court of Appeals would enforce a blanket prohibition of any release pending review of a conviction whenever the defendant raises as one issue ineffective assistance of counsel. Such a practice deprived Steele of liberty without due process of law.

Minnesota's new appellate practice also deprived Steele of equal protection. If the State provides an appellate system, that system must be "free of unreasoned distinctions" to pass equal protection scrutiny. *See Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). Steele is entitled under the sixth and fourteenth amendments to the effective assistance of counsel. A State appellate system that, in effect, denies release on bond to any defendant who dares to raise an ineffective assistance claim enforces an unreasoned, vindictive distinction.

The new Minnesota appellate procedure conflicts with this Court's precedents by refusing to recognize that convicts too may enforce a cognizable liberty interest in their personal freedom and by retaliating against those who raise the federally protected right to effective assistance of counsel. This Court should grant certiorari to vindicate its precedents and to provide guidance for all appellate courts on how to process ineffective assistance claims consistent with the fourteenth amendment.

II. MINNESOTA'S DECISION TO DENY CERTAIN CRIMINAL DEFENDANTS THE RIGHT OF DIRECT APPEAL RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

Although this Court has found no constitutional right to a direct appeal of a State criminal conviction, *McKane v. Durston*, 153 U.S. 684 (1894), a State that provides

an appellate system must do so consistent with due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12 (1955) (due process and equal protection clauses violated by State's denial of appellate review solely on account of a defendant's inability to pay for a transcript); *Douglas v. California*, 372 U.S. 353 (1963) (recognizing right to appointed counsel on direct appeal of criminal conviction). A State appellate system that withdraws the right of direct appeal whenever the appellant asserts his sixth and fourteenth amendment rights to effective assistance of counsel offends the fundamental fairness required by the due process clause. An appellate system that singles out proponents of the right to effective assistance of counsel enforces an unreasoned distinction offensive to the equal protection clause. See *Ross*, 417 U.S. at 612.

The Minnesota appellate courts have reasoned, however, that postconviction proceedings provide an adequate substitute for direct appeal. However, Minnesota's postconviction statutes grant no right to release pending further proceedings. See Minn. Stat. § 590.01-06. The hearing is a civil proceeding in which the defendant bears the burden of proof. Minn. Stat. § 590.04 Subd. (3). Given these two deficiencies, it must be concluded that proponents of ineffective assistance claims are singled out for less favorable treatment than similarly situated appellants.

This presents an important unresolved issue deserving this Court's consideration—particularly in view of its recent decision in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). There, the Court decided that a State need provide no postconviction remedy and that any remedy so provided need not comport with the dictates of equal protection and due process. The question left unresolved by *Finley*, and presented here, is whether a State can substitute postconviction remedies violative of equal protection and due process for certain kinds of direct appeals.

CONCLUSION

This Court should stay consideration of this petition until the District Court resolves Steele's motion to suspend execution of sentence pending postconviction proceedings; should the District Court take the unusual step of granting Steele's motion, his resulting continued release would substantially moot the issues raised herein. Should the District Court execute Steele's sentence, then the important issues noted in this petition will be ripe for this Court's review and this Court should grant certiorari.

Respectfully submitted,

ROBERT ARTHUR BRUNIG *
HOPE S. FOSTER
COREY J. AYLING
O'CONNOR & HANNAN
3800 IDS Center
80 South Eighth St.
Minneapolis, MN 55402
(612) 341-3800

* Counsel of Record

Counsel for Petitioner

Dated: January 16, 1990

APPENDIX



APPENDIX

STATE OF MINNESOTA
IN COURT OF APPEALS

CX-89-888

STATE OF MINNESOTA,
Respondent,
vs.

DAVID VINCENT STEELE,
Appellant.

ORDER

[Filed Aug. 25, 1989]

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. Appellant moves to stay this appeal and for a remand to the trial court for the filing of a petition for post-conviction relief.
2. It appears appeal should more properly be taken from an order deciding the post-conviction petition, if necessary.

IT IS HEREBY ORDERED this appeal is dismissed.

Dated: August 24, 1989.

BY THE COURT

/s/ Edward J. Parker
JUDGE EDWARD J. PARKER

CLL/ojs

STATE OF MINNESOTA
IN COURT OF APPEALS

#CX-89-888

STATE OF MINNESOTA,
Respondent,
vs.

DAVID VINCENT STEELE,
Appellant.

ORDER

[Filed Aug. 31, 1989]

- BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. Appellant previously moved for a stay and remand, to permit him to bring a postconviction petition in the trial court.
2. By order on August 24, 1989, this court dismissed, indicating that the issues are more properly presented on appeal from a postconviction order.
3. Appellant now moves for clarification, again requesting that the appeal be stayed, rather than dismissed, pending postconviction proceedings.
4. It is this court's practice to dismiss such appeals in their entirety, to permit a return of jurisdiction to the trial court, and to facilitate the full development of a record.

IT IS HEREBY ORDERED:

1. Appellant's request for "clarification" of the dismissal order is denied.

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2. This order shall not preclude a later appeal from the postconviction order, and shall not limit the issues which may be raised in that appeal.

Dated: August 29, 1989

BY THE COURT

/s/ D. D. Wozniak
Chief Judge

CLL:mb

**STATE OF MINNESOTA
IN SUPREME COURT**

CX-89-888

STATE OF MINNESOTA,
Respondent,
vs.

DAVID VINCENT STEELE,
Appellant.

ORDER

[Filed Oct. 19, 1989]

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of David Vincent Steele for further review be, and the same is, denied.

Dated: 10-19-89

BY THE COURT:

/s/ Peter S. Popovich
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

CX-89-888

STATE OF MINNESOTA,
Respondent,
vs.

DAVID VINCENT STEELE,
Appellant.

ORDER

[Filed Nov. 17, 1989]

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that David Vincent Steele's petition for rehearing of a denial of a petition for further review, be, and the same is, denied.

Dated: 11-17-89

BY THE COURT:

/s/ Peter S. Popovich
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

CX-89-888

STATE OF MINNESOTA,
Respondent,
vs.

DAVID VINCENT STEELE,
Appellant.

ORDER

[Filed Dec. 20, 1989]

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that Vincent Steele's motion for a stay of the judgment of the Court of Appeals dismissing his appeal and affirming his conviction pending proceedings in the United States Supreme Court, be, and the same is, denied.

Dated: 12-20-89

BY THE COURT:

/s/ Peter S. Popovich
Chief Justice

MEMORANDUM

Movant was convicted of criminal sexual conduct in the fourth degree. The district court granted his motion for a stay of execution of his 41-month prison sentence pending appeal. After filing his appeal, movant moved the court of appeals for an order staying the appeal and remanding so that he could obtain a post-conviction hearing on his claim that his trial counsel failed to represent him effectively. The court of appeals' policy in such cases is to dismiss the appeal and to allow the defendant to raise all the issues on an appeal from the denial of post-conviction relief. It followed that policy in this case. Movant claimed in his petition for review, which we denied, that as a result of the dismissal he was deprived of his liberty (his release pending appeal) and that he was being deprived of his opportunity to have all issues decided on appeal. The stay of execution of sentence pending appeal was granted by this district court in the exercise of its considerable discretion. It may be that if the district court was willing to let movant remain free pending a direct appeal, it will allow him to remain free pending the outcome of the post-conviction proceeding and the subsequent appeal, if any, unless it is clear that the filing of the post-conviction petition was purely for the purpose of delay or unless there are other changed circumstances. There is also no reason to believe that movant is being deprived of his opportunity to have all issues decided on appeal. The chief judge of the court of appeals, in the order dated August 29 and filed August 31, stated expressly that "this order shall not preclude a later appeal from the post-conviction order, and shall not limit the issues which may be raised in that appeal."